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IN THE

Supreme Court of the United States

May Term, 1943.

No. 955.

FRANK VALENTI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONER.

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The brief of the United States inadvertently misstates some of the evidence in the above case.

At page 8 (3) referring to De Vita's unpublished telephone number it appears that the telephone was in the name of Joseph Conti, the younger (Supplemental Record page 2), who was acquitted by the jury (R. 266).

At (R. 166) Randazzo drove petitioner's new Oldsmobile on November 12th, 1940 but the Oldsmobile driven by De Vita (79) was Alphonse Valenti's not the petitioner's and was a 1941 Oldsmobile Sedan—also the 1939 Chevrolet was owned by Rose Greco—not petitioner.

(6) Page 9. Much of the activity around 19 Mayberry Street was due to repairs to household at Mayberry Street (532-534) and so admitted by government agent.

(7) As to activity between Lo Tempio and Joseph Valenti the government agent (R. 103-104) admitted that Frank Valenti was never seen at Bellwood Place or Mayberry Street during the period of observation.

Answering Point II.

It is absurd to argue that the evidence of the witness Maguire did not prejudice the petitoner. As stated heretofore the attorney for petitioner objected to the conversation as stated by Maguire and excepted. At page 7 of the supplemental transcript of record on appeal that the record should show that the Court overruled the objection at folio 621, folio 207 and the attorney for the defendant, Frank Valenti also excepted. (Judge Clark (R. 290) notes that Court appears never in fact to have ruled on matter.)

It is respectfully submitted that the ruling grievously damaged the petitioner. The case was close, the jury deliberated nearly twenty-three hours (R. 264) and the prosecutor conducted his summation along a prejudicial line as indicated at the outset of Court's charge (R. 250).

As this Court said in Glasser vs. United States, 315 U. S. 60, 67:

> "Admittedly the case against Glasser is not a strong one * * *. In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed

aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

Under the circumstances what could the attorney for the petitioner do? Must he sit idly by when a court rules erroneously for fear that any questions asked will constitute waiver? Or must he concede its truth by failing to combat it? At least in New York State it is held that a party does not waive objections to the admission of evidence by endeavoring to rebut it.

Woods vs. Buffalo R. R., 35 A. D. 203; 54 N. Y. Supp. 735.

Middleworth vs. Lowery, 89 A. D. 418; 85 N. Y. Supp. 872-874.

Rothenberg vs. Filarsky, 62 N. Y. Supp. 721 at 722.

The right to have a case tried free of prejudice is too fundamental to allow anyone to guess as to the amount of prejudice that the defendant suffered in the instant ruling. In short the ruling was erroneous, affected a substantial right and was highly prejudicial.

McCandless vs. U. S., 298 U. S. 342 at 348.

A Writ of Certiorari should issue.

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